13

Office Supreme Court, U. S.
FILED
JUL 5 1952
CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1951

No. 180

JOSEPH PIGNATARO,

Petitioner,

against

WATERMAN STEAMSHIP CORPORATION,

Respondent.

and

RYAN STEVEDORING CO., INC.,

Respondent-Impleaded.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

PHILIP F. DI COSTANZA,
Proctor for Petitioner.

JACOB RASSNER,
on Petition.

INDEX

PETITION FOR WRIT OF CERTIORARI — PAGE

Questions Presented 1

Opinion Below 2

Jurisdiction 3

Statement 4

Reasons for Granting the Writ 5

Errors Complained of 6

BRIEF IN SUPPORT OF PETITION

Argument 7

An Analysis of the Testimony 9

POINT I—It is repugnant to the American concept of law to permit the mood of a trial court to constitute the basis of a decree in admiralty in total disregard of uncontradicted evidence and on the conceded testimony of respondents witnesses that a rotten hatchboard broke and caused the accident 12

POINT II—The Court below erred in sustaining the trial court's decision which was based on collateral issues and not on the evidence 14

POINT III—A decree unsupported by any evidence and contrary to the uncontradicted and conceded testimony of petitioner's witness, constitutes error 21

PAGE

Point IV—The trial court erroneously drew an inference that both petitioner's and respondent's witnesses were interested in petitioner's cause and from said inference drew the inference that they were not telling the truth, and from the inference that all the fact witnesses were not telling the truth a further inference was drawn that the hatch board did not break, although there was no explanation by any ship's officer or employee or any one else as to how the respondent claimed the accident did occur 24

Conclusion 24

Table of Cases

Alabama Title and Trust Co. v. Millsap, 71 F. (2d) 518 19

American Co. for International Commerce v. United States, 26 F. (2d) 468 22

Ariasi v. Orient Ins. Co., 50 F. (2d) 548 20

Barbarino v. Stanhope S.S. Co., 151 F. (2d) 553, 555... 18

Belden v. Chase, 150 U. S. 674 23

Bermuda & West Indies S.S. Co. v. Oceanic Steam Nav. Co., 278 U. S. 654 21

Betzag v. Gulf Oil Corp., 298 N. Y. 358, 364, 365 15

Cannella v. Lykes Brothers S.S. Co., 174 F. (2d) 794.. 15

D'Allessandro v. Bechtol, 104 F. (2d) 845 15

Erie R. Co. v. Murphy, 9 F. (2d) 525 16

Fong Lum Kwai v. U. S., 49 F. (2d) 19 15

Gibson v. Southern Pac. Co. 67 F. (2d) 758, c. d. 54 S. Ct. 458, 291 U. S. 673, 78 L. Ed. 1062 20

Gulotta v. United States, 113 F. (2d) 683 16

PAGE

Hackworth v. Chesapeake & O. Ry. Co., 73 F. Supp. 348 16

Kraljer v. Snare, 221 F. 225, 137 C. C. A. 108 16

Kuhn v. U. S., 24 F. (2d) 910, rehearing denied and reversed in part, 26 F. (2d) 463 c. d., 49 S. Ct. 11, 278 U. S. 605, 73 L. Ed. 533 15

Lancashire Shipping Co. v. Morse Dry Dock & Repair Co., 48 F. (2d) 1077, affirming, D. C. 43 F. (2d) 750, c. d., 284 U. S. 642 21

Mutual Life Ins. Co. of New York v. Sargent, 51 F. (2d) 4 19

Nelson v. Robin Line Steamship Co. Inc., 39 F. (2d) 430, 432 22

New York Life Ins. Co. v. Bacalis, 94 F. (2d) 200 15

Olds v. McKercher, 72 F. Supp. 256 23

Seas Shipping Co. v. Sieracki, 328 U. S. 85 .....15, 23

Sutton's Adm'r v. Louisville & N. R. Co., 168 Ky. 81, 181 S. W. 938, 940 16

The Buenos Aires, 5 F. (2d) 425 21

The City of New York, 147 U. S. 72 23

The Fort St. George, 22 F. (2d) 195, affirmed C. C. A. 1928, 27 F. (2d) 788, c. d., 1929 21

The Windrush, 286 F. 251 21

Travelers' Indemnity Co. v. Parkersburg Iron & S. Co., 70 F. (2d) 63 19

U. S. F. & G. v. U. S., 152 F. (2d) 46 23

IN THE

Supreme Court of the United States

October Term, 1951

No.

JOSEPH PIGNATARO,

Petitioner,

against

WATERMAN STEAMSHIP CORPORATION,

Respondent.

and

RYAN STEVEDORING CO., INC.,

Respondent-Impleaded.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

NOTE: No appeal was taken insofar as respondent-impleaded is concerned.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on February 27, 1951.

Questions Presented

1. Is review by the Supreme Court of the United States available to correct a decision that a Court of Appeals predicated on alleged evidence, which it assumed from

argument of counsel had been presented at the trial, but which in fact was non-existent?

2. Whether our Admiralty Courts are no longer concerned with the true administration of justice, based on evidence, and have become a mere locale of chance where decrees are dictated by the trial court's personal pleasure. In other words, is a decree of a trial court unassailable on appeal, irrespective of the following:

a. The absence of any finding of fact as to the cause or manner of the happening of the accident.

b. That the testimony of the six witnesses to the accident called by the petitioner was corroborated and conceded as true by the two witnesses called on behalf of respondent.

c. That the trial court disregarded the basic and fundamental rules of evidence.

d. That there is no support in the record for various statements in the opinion.

e. That the trial court based the opinion solely on his expressed personal displeasure toward the attitude of each and all of the eight witnesses called by both parties, as indicating an interest in the success of the petitioner's cause.

Opinion Below

Per Curiam; on the night of 12/18/47, Joseph Pignataro, a longshoreman employed by Ryan Stevedoring Co. Inc., hereinafter called Ryan, was working on the main deck of the S.S. ALBERT K. SMILEY, owned by the Waterman Steamship Corp., hereinafter called Waterman, Pignataro was standing on a hatchboard cover over the No. 1 hatch opening guiding a cable that was brought up from the 'tween deck. While there engaged he fell to the floor of the lower

hold, a distance of about thirty feet; and sustained serious injuries for which he filed the instant libel against Waterman, which corporation interpleaded Pignataro's employer Ryan, since the latter was in charge of the loading operations on board ship. Libelant's account of the accident was that his fall was caused when the hatchboard cover on which he was standing broke beneath him because the boards were rotten. His witnesses tended to support this version and, indeed, two of the respondent's witnesses also supported it although their testimony was in conflict with written statement they had made prior to the trial. The respondent did not offer any particular explanation as to how the accident happened but did produce witnesses in the persons of Radigan and Petrosino, who testified in substance that the hatchboard covers were in good condition before the accident occurred. There was conflicting testimony and the trial judge refused to believe the libelant's witnesses indicating in his opinion that their demeanor while testifying gave rise to serious doubts as to their credibility. He concluded that the libelant had not sustained his burden of proving that the cover was defective, which fact was the sine qua non of the respondent's liability on the theory that the ship was unseaworthy which libelant advanced on the trial. It is almost superfluous to state that on this record the trial courts' findings are not clearly erroneous, and the decree, therefore, is AFFIRMED.

Jurisdiction

The judgment of the Court of Appeals was entered on February 27, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Statement

Petitioner was a longshoreman on December 18, 1947, in the employ of Ryan Stevedoring Co. Inc., respondent impleaded, doing longshore work aboard the S.S. ALBERT K. SMILEY, respondent's vessel (6, 35, 36). He had been assigned with eleven other men and a foreman to the number one hatch where he had worked since the day before the accident (36).

The hatch was composed of five beams on each deck, on which there were six sections of hatchboards, nine boards to each section, which hatchboards were about 2½ feet wide (37).

Just before the accident three sections were in place on the main deck, from which one hatchboard had been removed in the middle row to leave room for the fall, (43, 44, 55). After the accident the hatchboard next to this removed board was missing (60).

The accident occurred on December 18, 1947 at about 7:30 P. M. (42). Just prior to the accident the men had finished putting beams in the 'tween deck and they were about to cover them with hatchcovers (41, 44, 45, 54). The fall was not in motion and the winch was stopped (42, 44, 45, 54, 59, 64, 66).

Petitioner had just relieved the hatch foreman for the purpose of guiding the fall, then stationary, when the hatchboard on which he was standing broke, and petitioner was precipitated thirty feet into the lower hold (49, 54, 66, 81), resulting in petitioner suffering injuries which necessitated the removal of about one quarter of his skull which was replaced by metal and other serious injury and permanent disability.

Numbers refer to pages in appendix to Appellant's Brief in the Court below.

Reasons for Granting the Writ

It is of the utmost importance to all litigants that the Court sitting in Admiralty should make a finding of fact as to the circumstances under which the accident took place.

It is impossible for an Appellate Court to justly apply the law when in total ignorance of the manner of the happening of an accident, whether the accident happened as petitioner contended or whether the accident happened in one of the two ways suggested by the respondent. Had the trial court stated the manner in which the accident occurred, irrespective of whether it was in the manner contended by petitioner or one of the two contended by the respondent, such finding might very well have been the basis for a decree in favor of petitioner under the law.

The true administration of justice cannot be attained when an Appellate Court erroneously holds that an issue of fact was presented by assuming that two witnesses gave contradictory evidence, when such evidence was non-existent.

Such manifest error indicates that the Appellate Court obviously assumed that such testimony was actually given at the trial, and failed to check the record, a reading of which would have disclosed that such testimony was never presented. Neither Radigan nor Petrosino testified, as the Appellate Court found, as to any inspection of the hatchboard in question before the accident occurred.

Errors Complained of

1. That the trial court made no finding of fact as to the cause or manner of the happening of the accident.

2. That the expressed personal displeasure of the trial court toward the attitude of each and all of the witnesses to the accident constituted the basis of the Court's decision,

in total disregard of the uncontradicted and conceded evidence.

3. That the Court below based its affirmance of the trial court's decree on a finding that there was conflicting evidence by reason of the fact that one Radigan, and one Petrosino, had testified "in substance that the hatchboard covers were in good condition before the accident occurred."

THERE WAS NO SUCH TESTIMONY.

JOSEPH PIGNATARO,
Petitioner,

By PHILIP DI COSTANZA,
Proctor for Petitioner.

Argument

The Court of Appeals for the Second Circuit held as follows:

> "Libelant's account of the accident was that his fall was caused when the hatchboard cover on which he was standing broke beneath him because the boards were rotten. His witnesses tended to support this version and, indeed, two of the respondent's witnesses also supported it * * *."

The Court continued:

> "* * * although their testimony was in conflict with written statements they had made prior to the trial."

If in fact (which is denied) such written statements by respondent's witnesses were in conflict with their testimony at the trial, such conflicting testimony can hardly be urged as the basis for a decree in respondent's favor, but only as attacking the credibility of respondent's witnesses and not of the six petitioner's witnesses.

The Court below found that the trial court had made no finding of fact as to how the accident occurred, stating as follows:

> "The respondent did not offer any particular explanation as to how the accident happened * * *."

The Court continued:

> "* * * but did produce witnesses in the persons of Radigan and Petrosino, who testified in substance that the hatchboard covers were in good condition before the accident occurred."

(The following references are to the appendix of appellee's brief.)

The Court below stated that both Radigan and Petrosino saw the hatchboard before the accident occurred. The Court below was in error.

Radigan testified that before the accident, the hatch boards were covered with tarpaulin and folded over (fols. 105-106). He further testified he made no inspection after the accident (fol. 68).

Petrosino testified he arrived at the scene of the accident forty minutes after its occurrence (fol. 139) and that he made no inspection (fols. 141, 142, 149, 150).

The situation presents itself as follows:

Six eye witnesses called on behalf of petitioner testified that the accident occurred as the result of a rotten hatchboard which looked alright from its upper surface, but broke and thus caused the accident.

The two eye witnesses called by respondent testified that they saw the accident, and fully corroborated petitioner's witnesses.

Respondent called two people who were not witnesses to the accident and who knew nothing about the physical condition of the hatchboard in question, and gave no testimony as to its condition.

The Court below sustained the trial court who did not make any finding of fact as to how the accident occurred, whose decision was based on his personal reaction that he did not like the demeanor of either the petitioner's nor respondent's witnesses to the accident.

It is respectfully submitted that it is of the utmost importance to all litigants that their claims be decided on the evidence and not on the mood of a trial court.

An Analysis f the Testimony

Frank Zalinski, witness or petitioner, testified that he was one of the hold men, anding in the starboard wing of the 'tween deck (38, 46, 0*). That at the time of the accident the fall was not in motion (42, 44, 45). That he heard a scream and saw pe tioner fall together with two pieces of a hatchcover (42, 5, 47). That he inspected the wood and the metal band eircling same, and saw that the "band was rusty and t e wood was rotten, warped" (47).

Stanley Kosek was also stationed in the 'tween deck at the time of the accident 53), and saw petitioner and a piece of a hatchboard fall d wn, followed by a larger portion of the board (53, 54). H testified that the wood looked "rotten" (57).

Henry Lecki, also statio ed on the starboard side of the 'tween deck, heard a scre m, and saw petitioner precipitated into the hold (58). hough he turned around too late to see the hatchboard fal he later saw two hatchboards missing from the middle s tion on the main deck (one in addition to the board ori inally removed for the fall), and that the fall had not be n in motion just prior to the accident (58, 59, 60).

Michael Zaluski, also st tioned on the starboard side of the 'tween deck, saw peti oner fall with two pieces of a hatchboard (61). He saw th pieces the following morning, which appeared "rotten" (62, 63).

Carmine Pignataro, peti ioner's first cousin, also stationed in the 'tween deck, t stified that the fall was stationary and that he doesn remember two pieces of a hatchboard falling with his ousin, as it was too dark for him and he was excited (63, 64).

References are to pages of appendix to appellant's brief in the Court below.

Sigmund Kosek, the hatch foreman, did not see the accident (65). He had handed the stationary fall to petitioner on the main deck, and had his back to the scene (66). That thereafter he went down into the hold and observed that the hatchboard was in two sections and that the larger section appeared rotten under the metal band with the screws sticking out (66, 67). The space left on the main deck hatch section by the broken board was thereafter made up by spacing the other boards (68).

In his statement, referred to in the opinion (100), Sigmund Kosek denied knowing what caused petitioner to fall, which he reaffirmed in his testimony. Nonetheless, the opinion assails petitioner's case on a purported contradiction of statements given by this witness who admittedly did not see the accident and whose statements were based on hearsay versions from others (100).

Sigmund Kosek was the sole witness for petitioner whose testimony was subject to cross-examination on purported contradictory statements made prior to trial.

Respondent's witness and employee, Cyril P. Radigan, did not see the accident, but made a log entry based on a statement of Charles Del Gatto, one of the winchmen.

Respondent's witness, Joseph Privi, the port winchman at the time of the accident, was stationed about twenty-five feet away from petitioner (71, 72). He testified that the fall had not moved and that petitioner fell down when the board on which he was standing broke (73). He had told the interviewer who took his statement that petitioner fell with the hatchboard, and that after the accident he saw the hatchboard missing (75, 79). In his statement dated January 9, 1950, he set forth that he did not know what caused the hatchboard to move and that he did not see it move (77, 78). His testimony at the trial explains that this didn't mean the hatchboard remained on the main deck while

petitioner fell into the hold, and the Court recognized that the language in the statement was not that of the witness (79).

Respondent's witness Charles Del Gatto was also a winchman, and saw petitioner go out on the hatchboard to relieve his foreman, while the winch was stopped, and testified that the board broke under petitioner and precipitated him into the hold (80, 81). A purportedly contradictory statement given by the witness to an interviewer on December 21, 1949 was admitted over objection and the Court then stated "I am going to now receive it in spite of the fact that he appears to be impeaching his own witness" (83, 84).

Del Gatto unequivocally denied the truth of certain portions of this improperly admitted statement and stated under oath that those contradictory portions were never read to him after he gave the statement (85, 86, 87). The challenge was never met by respondent who did not present the interviewer to the Court to contradict Del Gatto's testimony as to the errors in the statement.

Respondent's witness Prospero A. Petrosino, employed by respondent as security officer, testified as to the statements given by Sigmund Kosek, based on versions obtained from others (92, 93, 94). His testimony was in effect double hearsay.

Respondent's witness James M. Reid, employed as a watchman for respondent, who came aboard the vessel as petitioner was being removed, testified as follows:

> "Q. In those statements made to you did anybody tell you that the cause of the accident was that a hatch cover broke? A. Yes, sir" (96).

During the course of the testimony of the last "fact" witness, Prospero A. Petrosino, and after he had finished

testifying on respondent's theory as to the cause of the accident, the Court stated as follows:

> "The Court: You know what we are dealing with here—the question that you know very well. The condition of those hatch covers and what there was about the hatch covers which might have been responsible for what happened to the libellant in this case. I don't think the hooks have anything to do with it" (95).

By reason of the accident petitioner suffered a fractured skull and blood clot, with consequent removal of a large section of his skull, replaced with a metal plate, as well as fractures of his petrous bone and left patella, and other injuries (16) and was not mentally competent to testify in his own behalf as a result thereof.

Neither the master nor any other officer or member of the crew was called nor his absence explained by the respondent.

The trial was held on February 6, 7 and 8, 1950. The decision was not rendered until January 30, 1951.

POINT I

It is repugnant to the American concept of law to permit the mood of a Trial Court to constitute the basis of a decree in admiralty in total disregard of uncontradicted evidence and on the conceded testimony of respondent's witnesses that a rotten hatchboard broke and caused the accident.

The trial court made no finding as to how the accident occurred. His basis for a decree in favor of the respondent is not on any testimony whatsoever, but on the following grounds: (The following references are to the appendix of appellant's brief.)

1. That petitioner's witnesses had signed contradictory statements.

2. That petitioner's witnesses showed by their demeanor that they were eager to help petitioner's cause (fols. 302, 303).

3. That they were evasive.

4. That they agreed on several minute details.

5. That they contradicted each other.

Inadequate as is the basis advanced by the trial court for the decree, even such reasons are unsupported by the record.

1. As to contradictory statements, five of the six of petitioner's fact witnesses had made no statement contradictory or otherwise. The sixth, Sigmund Kosek, testified in accordance with his statement and testified that it was true (fol. 203).

2. As to eagerness to help petitioner's cause, it would be a dangerous precedent indeed to hold that a witness was incompetent to testify if he had a preference for one litigant's cause over the other's.

3. The charge of evasiveness is unfounded. Cross-examination was waived as to Henry Lecki (fol. 179). Carmine Pignataro, who was working in the 'tween deck was asked four questions in cross-examination, to which he gave direct short answers. Michael Zaluski was asked six questions in cross-examination to which he gave direct short answers. Stanley Kosek was likewise asked six questions in cross-examination to which he gave direct and short answers. Counsel for respondent-impleaded conducted a short examination which was in the nature of an explanation of some of the details of the work. Sigmund Kosek, who had signed a statement, was given a short examination, the substance of which cross-examination demonstrated that what he had testified to at the trial and what he said in the statement was substantially the same and a true version of what had taken place. Frank Zalinski

was put through an extremely short examination and gave short and direct answers to all the questions.

A reading of the record will disclose no basis for the charge of evasiveness.

4. The fact that witnesses agreed with each other needs no argument. To hold that agreement by witnesses for a claimant is the basis for a degree against him has no support in law or fact.

5. The charge that witnesses contradicted each other seems strange in the face of the trial court's decision that they agreed with each other in many minute details. The record will not disclose one single contradictory fact of any substance.

The fact that one witness failed to see both pieces of the hatchboard come down and only saw one of them, while others saw both pieces, is the only evidence which might be considered at variance between the witnesses.

POINT II

The Court below erred in sustaining the Trial Court's decision which was based on collateral issues and not on the evidence.

Respondent called Joseph Privi and Charles Del Gatto for the sole purpose of impeaching their credibility by prior written statements. Actually, respondent failed to impeach their credibility. However, permitting such witnesses to testify over objection constitutes error.

Calling a witness for the sole purpose of impeaching him or offering in evidence a statement which could not otherwise be received in evidence, constitutes error.

A party cannot introduce ex parte statements of its own witness, by calling an unwilling witness to the stand. *Kuhn* v. *U. S.*, 24 F. 2d 910, rehearing denied and reversed in part, 26 F. (2d) 463 c. d., 49 S. Ct. 11, 278 U. S. 605, 73 L. Ed. 533.

Statements made by a litigant's witnesses before trial, inconsistent with their testimony at trial, are admissible for purpose of impeachment only on showing that litigant had been entrapped by such statements and ought not to be bound by their testimony. *New York Life Ins. Co.* v. *Bacalis*, 94 F. (2d) 200.

A party cannot call a witness for the sole purpose of impeaching him by inconsistent statements. *Fong Lum Kwai* v. *U. S.*, 49 F. (2d) 19.

A statement which seems to contradict a witness may be used for impeaching said witness, but not as original evidence. *D'Allessandro* v. *Bechtol*, 104 F. (2d) 845.

Petitioner was not required to negative the existence of remote possibilities that the injury was not caused by the respondent or that respondent was not negligent. *Betzag* v. *Gulf Oil Corp.*, 298 N. Y. 358, 364-365.

The opinion of the Court below fails to consider the count for unseaworthiness. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85. On a similar issue before said Court, where a complaint of a longshoreman was dismissed because the evidence would not support the count for negligence, the judgment of the trial court was reversed on the ground that "the same considerations do not, however, dispose of the count for unseaworthiness". *Cannella* v. *Lykes Brothers S.S. Co.*, 174 F. (2d) 794.

Libelant contended and proved that a certain hatchboard broke while in a rotten and defective condition, thereby causing him to be precipitated down into a hold. Not one witness present at the time contradicted petitioner's contention.

In the case of *Erie R. Co.* v. *Murphy,* 9 F. (2d) 525, before Hough, Manton, and Hand, Circuit Judges, the Court said on page 526 as follows:

> "[3] An inference is not legally the same thing as a presumption, though both may connote a reasoning process, for a presumption may measurably take the place of proof, while the inference we have stated 'does not relieve from the burden of proof but does put the burden of evidence—i.e., of explanation—on' (in this case) the defendant below. Kraljer v. Snare, 221 F. 255, 137 C. C. A. 108."

An inference can never be based on an inference, so well expressed by Commissioner of Appeals Clay in *Sutton's Adm'r* v. *Louisville & N. R. Co.,* 168 Ky. 81, 181 S. W. 938, 940 cited with approval at page 352 in the case of *Hackworth* v. *Chesapeake & O. Ry. Co.,* 73 F. Supp. 348, in the following language:

> "Following this rule, it is held that conjecture affords no sound basis for a verdict. It is not sufficient, therefore, to present a number of circumstances about which one might theorize as to the cause of the accident. Where it is sought to base an inference on a certain alleged fact, the fact, itself must be clearly established, if the existence of such a fact depend on a prior inference, no subsequent inference can legitimately be based upon it."

See also:

Gulotta v. *United States,* 113 F. (2d) 683.

The evidence was so overwhelmingly on the side of the petitioner as to leave no reason to doubt the fact that the accident happened as testified to by all of the eye witnesses.

Nothing in the record will show any testimony as to any material fact which is conflicting, vague or uncertain as to the cause and manner of the happening of the accident.

There is nothing in the record to sustain a decree in favor of the respondent, either on the facts or on the law.

The trial court disregarded the unimpeached and credible testimony of six witnesses to all of whose testimony cross-examination was substantially waived by respondent, and commented on the testimony of Sigmund Kosek.

Instead of relying upon testimony the Court accepted statements of respondent's professional investigator Petrosino as an experienced hand on testifying, that Sigmund Kosek had given conflicting oral versions to him of the accident as proof that Kosek was unworthy of belief because he did not see the accident. Petrosino's experience in testifying appears from the following (fol. 142): Appellee's Brief.

> "Q. How many times have you testified in Court during your lifetime? A. Numerous times.
> Q. Does that mean a thousand? A. Probably."

This, in the face of the uncontradicted fact that Kosek was at the scene as foreman in charge of the work seems unjustified. In any event, the contradictory statement by Kosek made outside of the Court could only go to the weight of the evidence and such oral contradictory statements could not be used as the basis to substitute for evidence.

A decree which lacks any support in the record is clearly erroneous.

The Court below, in the case of *Barbarino* v. *Stanhope S.S. Co.*, 151 F. (2d) 553, 555, speaking of the trial Court's findings, did not require that said Court defer to the decision of the lower Court even where the findings of fact were not clearly erroneous, saying as follows:

> "* * * his finding, like that upon the first, would not have been a 'finding of fact' which we must accept unless 'clearly erroneous'. It is true that in a jury trial the standard of care demanded in any given situation is regarded as a question of fact, and the verdict is as conclusive upon it as it is upon any other question; for a jury is deemed—rightly or wrongly—to be as well qualified to set such a standard as a judge. But when the decision is that of a judge, we distinguish between such findings and true findings of fact; and the conclusion is as freely reviewable as any 'conclusion of law', strictly so called. The C. W. Patterson, 2 Cir., 70 F. 2d 712; Ford Motor Co. v. Manhattan Lighterage Corporation, 2 Cir., 97 F. 2d 577; The Ira S. Bushey, Inc., 2 Cir., 120 F. 2d 1010. That this is right appears, when we consider that to fix any standard of care two conflicting interests must be always appraised and balanced, that of the person to be protected, and that of the person whose activity must be curtailed. It is true that the interest of the person to be protected must also be discounted by the improbability that it will be invaded, and that that involves only a question of fact; nevertheless, in the end no decision can be reached except by choosing between two human interests, one of which must be sacrificed. Such choices are the very stuff of law, and as to them appellate courts have no reason to defer to the decisions of courts of first instance."

If ever a situation called for a trial de novo in admiralty the case at bar is it.

In the case of *Travelers' Indemnity Co.* v. *Parkersburg Iron & S. Co.*, 70 F. (2d) 63, the Court stated on pages 64, 65:

> "The rule is well settled, of course, that evidence contrary to established physical facts has no probative value. U. S. v. Diehl (C. C. A. 4th), 62 F. (2d) 343; Atlantic Coast Line R. Co. v. McLeod (C. C. A. 4th), 11 F. (2d) 22. But to justify the ignoring of evidence under this rule the evidence ignored must be utterly at variance with well-established and universally recognized physical laws and therefore inherently impossible. See Wasiota & B. M. R. Co. v. Hall, 167 Ky. 819, 181 S. W. 629; Wolf v. City R. Co., 50 Or. 64, 85 P. 620, 91 P. 460, 15 Ann. Cas. 1181."

The mood of a trial court is hardly justification for ignoring uncontradicted and conceded evidence.

In the case of *Mutual Life Ins. Co. of New York* v. *Sargent*, 51 F. (2d) 4, the Court stated on page 6:

> "[7] It is true enough that the rule though not universal, is well established in the federal courts, and in some state courts, that the uncontradicted testimony of a witness not impeached or discredited in any way, to a plain and simple fact capable of contradiction if untrue, does not raise an issue of fact to be submitted to a jury."

The trial court completely disregarded this well established rule of the federal courts.

In the case of *Alabama Title & Trust Co.* v. *Millsap*, 71 F. (2d) 518, the Court stated on page 520:

> "The rule is well settled that the uncontradicted testimony of a witness, not incredible in itself, nor

> impeached nor discredited in any way, to plain and simple facts capable of contradiction, ordinarily must be accepted as true by a jury."

The trial court refused to accept the uncontradicted testimony of six witnesses, not incredible in itself, nor impeached nor discredited in any way, as to plain and simple facts capable of contradiction, and which he should have accepted when sitting in the capacity of a trier of facts.

In the case of *Gibson* v. *Southern Pac. Co.*, 67 F. (2d) 758, c. d. 54 S. Ct. 458, 291 U. S. 673, 78 L. Ed. 1062, the Court stated on page 762:

> "[3] Appellant concedes that in the federal court, and in many of the state courts, the general rule is that the uncontradicted testimony of a witness not incredible in itself, nor impeached nor discredited in any way, to plain and simple facts capable of contradiction ordinarily must be accepted as true by the jury."

It might be fair to assume that one witness discredits himself by his attitude, but when you have six witnesses for the petitioner and two for the respondent, and apparently the master and all the officers and crew are available as a source of contradiction and not called nor their absence explained, that under such circumstances the mere reaction of the trial court should not suffice as the basis of a decree in total disregard of the evidence.

In the case of *Ariasi* v. *Orient Ins. Co.*, 50 F. (2d) 548, the Court stated on page 551:

> "Although it is a fundamental rule of law that a trial court is not required to accept the testimony of any witness as true, but must weigh the testimony of such witness in connection with all the other evidence in the case and determine the truth, in the

absence of all contradictory evidence and any inherent improbability in the testimony, the court cannot arbitrarily reject the testimony of a witness whose testimony appears credible."

The record clearly demonstrates that the trial court arbitrarily rejected the testimony of all the petitioner's and respondent's witnesses to the accident.

The positive evidence on the part of petitioner's witnesses is entitled under the law to greater weight than negative evidence urged by respondent. See:

The Buenos Aires, 5 F. (2d) 425;
The Windrush, 286 F. 251;
Lancashire Shipping Co. v. *Morse Dry Dock & Repair Co.*, 48 F. (2d) 1077, affirming, D. C. 43 F. (2d) 750, c. d. 284 U. S. 642;
The Fort St. George, 22 F. (2d) 195, affirmed, C. C. A. 1928, 27 F. (2d) 788, c. d. 1929, *Bermuda & West Indies S.S. Co.* v. *Oceanic Steam Nav. Co.*, 278 U. S. 654.

There was an abundance of positive and uncontradicted evidence on the part of the petitioner. There was no negative evidence on the part of the respondent (the lower Court's statement that there was, is not supported in the record).

POINT III

A decree unsupported by any evidence and contrary to the uncontradicted and conceded testimony of petitioner's witnesses, constitutes error.

The law is well settled that our Courts must base their decisions on evidence adduced in the courtroom and to hold that a decree unsupported by any evidence is unassailable on appeal, constitutes error, as is the affirmance which is predicated on the same basis.

The respondent failed to sustain its burden of proof that the hatchboard was in fact seaworthy or that the unseaworthy condition was not the proximate cause of the accident.

Respondent presented no proof to contradict the fact that the hatchboard on which petitioner had been standing fell down into the hold. In fact, one of respondent's speculative theories is that a hook from the ascending fall caught the underside of the hatchboard to cause it to go down with petitioner.

This latter theory was entirely discounted by the Court in the course of the trial and no credence in it is expressed in the opinion.

The opinion does read, however, as if the burden of proof devolved upon petitioner. This petitioner's burden goes no further than proof of an unseaworthy condition, clearly established by the petitioner herein, which respondent has failed to meet or controvert.

In the case of *American Co. for International Commerce* v. *United States*, 26 F. (2d) 468, Judge Winslow stated as follows on page 469:

> "The burden of proof is upon the shipowner to show due diligence in making a ship seaworthy."

In the case of *Nelson* v. *Robin Line Steamship Co., Inc.*, 39 F. (2d) 430, 432, where a defective winch was involved in an accident, though the exact cause of the accident was unknown, the Court held as follows:

> "However the evidence does clearly establish that the injury resulted from the use of a winch known to be defective, and, in the absence of positive testimony that the injury was wholly caused by some other and undisclosed defect, such as a defective bolt which could not have been discovered by the ship-

owners by reasonable diligence, the preponderance of the whole evidence sustains the allegation that the shipowner was negligent in furnishing such a winch for the use of the stevedores."

This has been further extended by the *Sieracki case, supra*, to include a warranty of seaworthiness for even latent defects.

The principle of law expressed in the *Nelson case, supra*, finds its basis in the Admiralty rule that where a vessel has committed a breach of duty, she must show not only that her fault did not cause the accident, but that her fault or neglect could not have caused the accident.

See:

Olds v. *McKercher*, 72 F. Supp. 256;
The City of New York, 147 U. S. 72;
Belden v. *Chase*, 150 U. S. 674;
U. S. F. & G. v. *U. S.*, 152 F. (2d) 46.

Respondent failed to controvert the essential elements in petitioner's case. In fact, two of respondent's witnesses, Privi and Del Gatto, supported petitioner's cause.

The record is completely barren of a single fact to support the decree of the trial court.

Only one of petitioner's witnesses, the hatch-boss Sigmund Kosek, gave what the trial court deemed to be contradictory statements. Yet the statements support the testimony of this witness that he did not see the accident and whatever conclusions he may have expressed were no more than hearsay.

To conclude from all this, as did the trial court, that this made the "collective testimony much too weak, inconclusive and uncertain to support a verdict in favor of petitioner" is clearly erroneous.

POINT IV

The trial court erroneously drew an inference that both petitioner's and respondent's witnesses were interested in petitioner's cause and from said inference drew the inference that they were not telling the truth, and from the inference that all the fact witnesses were not telling the truth a further inference was drawn that the hatch board did not break, although there was no explanation by any ship's officer or employee or any one else as to how the respondent claimed the accident did occur.

There is not a single fact set forth in the opinion of the trial court from which he drew any of his inferences. Without the existence of a fact no inference can be drawn.

See prior citations on page 16 of this brief.

CONCLUSION

When we consider the fact that the Presiding Circuit Judge was Augustus N. Hand in the Court below, a most brilliant, experienced and fair-minded jurist, and then read the opinion which erroneously states that Radigan and Petrosino gave testimony which in fact they did not, it would appear that after reading the record the Court below evidently retained the impression, what was said by counsel for respondent at the argument was actually contained within the record and thereby the Court was misled into error.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP F. DI COSTANZA,
Proctor for Petitioner.

JACOB RASSNER,
on Petition.

14

Office - Supreme Court, U. S.
FILED
AUG 9 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 180

JOSEPH PIGNATARO,

Petitioner,

against

WATERMAN STEAMSHIP CORPORATION,

Respondent,

and

RYAN STEVEDORING CO., INC.,

Respondent-Impleaded.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR WATERMAN STEAMSHIP CORPORATION IN OPPOSITION

EDWARD J. BEHRENS,
CHARLES H. LAWSON,
Proctors for Respondent.

In the

Supreme Court of the United States

October Term, 1952

No. 180

Joseph Pignataro,

Petitioner,

against

Waterman Steamship Corporation,

Respondent,

and

Ryan Stevedoring Co., Inc.,

Respondent-Impleaded.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR WATERMAN STEAMSHIP CORPORATION IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Eastern District of New York is reported at 1951 A. M. C. 759 and not otherwise. The opinion of the United States Court of Appeals for the Second Circuit is reported at 194 F. (2d) 404.

Jurisdiction

The judgment of the Court of Appeals was entered on February 8, 1952. The petitioner has invoked jurisdiction of this Court under 28 U. S. C. 1254 (1).

Question Presented

Should this Court review the decree of the United States Court of Appeals for the Second Circuit, affirming the decree of an admiralty judge who, having seen all of the witnesses and heard conflicting testimony, found as a fact that a hatch cover did not break.

Statement

Proctors for the respondent are mindful of Rule 27 (4) of this Court but the petitioner, having incorrectly quoted the Court of Appeals' opinion, has similarly been so inaccurate in his "Statement" and "Analysis of the Testimony" and so much has been omitted, the respondent is constrained to present a full statement of the case.

On December 18, 1947, at about 7:30 P. M., the petitioner, a longshoreman employed by Ryan Stevedoring Co., Inc., while standing on a hatch board at the No. 1 hatch of the S. S. Albert K. Smiley, fell into the hold and was injured (fols. 291-292).*

The gravamen of the petitioner's case—that fundamental fact he tried to prove at the trial—was that the hatch board broke. After a trial where conflicting evidence was presented, the admiralty judge found as matter of fact that "the hatch board upon which the libelant was standing at the time of the accident did not break" (fol. 314).

---

* Folio references relate to "Appendix to Appellant's Brief" in the Court below, unless otherwise noted.

After seeing and hearing all of the witnesses (there were no depositions) the admiralty judge concluded the libelant had "failed to establish by a fair preponderance of the credible evidence any negligence on the part of the respondent" or "any unseaworthiness of the S. S. ALBERT K. SMILEY" (fol. 315). As he wrote in his opinion (fols. 291-305) his conclusions were based in part on the "demeanor" of the petitioner's witnesses, the "evasiveness" of several of them, frequent "contradictions" of each other and previous written statements, unusual agreement on "minute details" and by believing testimony presented by the respondent.

The Court of Appeals for the Second Circuit, being fully informed in the premises by the record, briefs and oral arguments, applied the firmly established rule of law that an appellate court will not disturb a trial court's findings of fact unless they are "clearly erroneous". The Court said:

> "• • • There was conflicting testimony and the trial judge refused to believe the libellant's witnesses indicating in his opinion that their demeanor while testifying gave rise to serious doubts as to their credibility. He concluded that the libellant had not sustained his burden of proving that the cover was defective, which fact was the *sine qua non* of the respondent's liability on the theory that the ship was unseaworthy which libellant advanced at the trial. It is almost superfluous to state that on this record the trial court's findings are not clearly erroneous, and the decree, therefore, is affirmed."

Turning to the facts as developed at the trial, all who testified on the subject were in agreement that on the night before the accident, and at the time of the accident, all of the hatch covers appeared to be in good condition (Petitioner's witnesses Zelinski and Sigmund Kosek, Re-

spondent's witness Radigan, fols. 149, 157, Appendix to Appellee's Brief, pp. 18a, 36a). Consequently the petitioner abandoned any claim based on negligence in presenting the matter to the Court of Appeals and urged the theory that there was some unseaworthiness involved. Indeed, that was the theory upon which the case was tried.

The opening at No. 1 hatch where petitioner was injured was about 25 feet in length, about 24½ feet in width, and five steel beams divided it into six sections. Each of the sections was covered by nine hatch boards, running fore and aft. Each hatch board was about 4 feet long, 2½ feet wide, 2 inches thick, and was reinforced by a steel or iron band about 2 inches wide and ¼th inch thick, attached to the board with screws and running along the entire perimeter of both top and bottom of the board (fol. 294).

Immediately before the accident, the hatch boards had all been replaced in the three forward sections except one board had been left out of the center of the second section, and through this space ran a fall or cable, with bridle and hooks attached, so that the hatch beams could be replaced in the 'tween deck. After the hatch beams had been replaced in the 'tween deck, there was no further need for the bridle and hooks there, so the hatch foreman stood on one of the hatch covers on the main deck and was guiding the cable so that the bridle and hooks would come through the opening without being caught under the beam or hatch covers. The petitioner offered to do this job and, while standing on a hatch board, he fell into the hold (fols. 294-296).

The petitioner contended the hatch board broke. The respondent contended the libelant lost his balance, either in reaching for the fall, or because the shackle caught underneath the hatch board and lifted it up (fols. 292-293).

At the time of the accident there were twelve men working in petitioner's gang. Four men were on the main deck

and eight were on the 'tween deck (fol. 293). The petitioner called as witnesses five men who said they were in the 'tween deck and one who had been on the main deck (fol. 296). The respondent called as witnesses the other two men who had been on the main deck (the petitioner did not testify), the night relief mate, and the security officer (fols. 297-299).

There was a direct conflict in the testimony of the petitioner's witnesses who had been in the 'tween deck. Zalinski and Stanley Kosek said they saw the hatch cover come down in two pieces (fols. 139, 160). Lecki, who had an equal opportunity to see, only saw the petitioner but did not see the hatch cover falling down and, therefore, could not testify it was broken (fols. 172-173). Zaluski testified twice he saw "the hatch cover coming down" (fols. 181-182) and then said he saw it in two pieces as it fell, and described the pieces in great detail (fols. 182-183). The final witness from the 'tween deck, namely, Carmine Pignataro, a cousin of the libelant, testified affirmatively that he saw *the hatch cover fall in one piece* (fols. 189-193).

The petitioner's witness who had been on the main deck was Sigmund Kosek, the hatch foreman. He testified that after having handed the fall to the petitioner, he did not see Pignataro but "heard a cracking of wood and a scream and as I turned around he was going through that hatch cover" (fol. 196). He did not remember a written statement he had made less than a month before trial (fols. 200-201), wherein he had said he did not know what caused Pignataro to fall (fol. 202). Even the printed record shows his evasiveness (fols. 201, 203, and Appendix to appellee's brief, pp. 17a-18a).

The two witnesses who had been on the main deck and who were called by the respondent, namely, Privi and Del Gatto, repudiated previous written statements and showed by their demeanor they were anxious to help the

libelant (fol. 302). The former testified in *cross examination* that the hatch cover broke (fol. 219), although this was in direct conflict with his previous written statement (fols. 234, 298-300). The latter also repudiated his written statement, in which he had said that while Pignataro was guiding the fall as the bridle and hooks were being raised from the 'tween deck, the shackle bolt caught on the underside of the edge of the hatch cover on which he was standing, thus causing the hatch cover to raise about an inch, slide toward the starboard side of the ship, and Pignataro lost his balance (fols. 254-256).

Radigan, the night relief mate, had entered in the log that Pignataro had lost his balance while the gang was placing crossbeams in the forward part of the 'tween deck (fol. 208). He said he had received this information from Del Gatto (fol. 209). Del Gatto denied this on cross examination (fols. 269-270). The admiralty judge resolved the issue of credibility in favor of the respondent (fol. 302).

After the accident, the longshoremen covered up the hatch on the main deck by inserting the hatch covers. To account for the board allegedly broken and in the hold, Sigmund Kosek, the hatch foreman, testified for the petitioner that the space normally filled by the "missing" hatchboard was taken up by leaving spaces between the other eight hatchboards (fol. 204). Radigan, the night relief mate, and Petrosino, the security officer, both flatly contradicted this assertion and said all of the hatch covers were in place and in good order (Appendix to appellee's brief, pp. 24a, 25a, 47a, 48a). Additionally, Petrosino's testimony showed that Sigmund Kosek did not see the accident. Kosek had previously given to Petrosino two versions of the accident, saying of the second that it was a better version "of what I got from the men" (fols. 278-281).

The petitioner's advocate having objected, the witness Reid did not give any substantive testimony (Transcript of Record, pp. 280-284). There was produced before the admiralty judge a hatch cover similar to the one involved in the case at bar. It was inspected by the Court under a stipulation that it would not have to be made a part of the record and that it might be returned to the vessel from which it had been brought (Appendix to appellee's brief, p. 58a).

Summary of Argument

The petition for certiorari in this case is entirely based upon a misquotation of the opinion of the Court of Appeals for the Second Circuit. The petitioner has incorrectly printed the opinion of the court, omitting a vital matter which results in a distortion of the actual holding. When the true opinion of the court below is considered, it will be seen that the petition automatically falls.

The whole issue which was litigated in the District Court was whether a hatch board broke. The evidence on the subject was in direct conflict, as the record amply discloses. The trial court decided the contested issue of fact adversely to the claim of the petitioner. He wrote a deliberate opinion and based his conclusions as to which witnesses he chose to believe upon their demeanor, evasiveness, conflicts in vital matters, unusual agreement in minute details and the other customary criteria used by all triers of the fact.

Disbelieving the petitioner's witnesses, and having found as a fact that the hatch board did not break, the District Court was under no obligation, and indeed it was impossible, to make any affirmative finding supporting either of the theories advanced by the respondent. To have done so would have been to commit error, and the petitioner can hardly be heard to complain that the trial court failed to commit error.

The petitioner has cited no authority to support a petition for certiorari in a case of this character. The law is quite clear in the Court of Appeals that as an appellate court it will not and indeed cannot disturb the findings of fact of a trial court except in those rare instances where there has been obvious error. It considered the record in the case at bar, and could find no error, manifest or otherwise. The rule in this Court that in the absence of plain error the findings of fact below are conclusive here has been too frequently expressed to result in any misunderstanding on the part of the members of the bar. The case has been unanimously decided below on conflicting evidence. It is well established that this Court will not grant certiorari to review such evidence.

The petitioner has presented no authority for his position here, but has referred to a large number of cases on miscellaneous problems of evidence, etc., no one of which has any effect whatever upon the pending application. There is no problem of law presented by the petition, and no valid reason has been assigned, directly or indirectly, why the conflicting evidence heretofore thoroughly reviewed on two occasions should now be reviewed for the third time.

POINT I

The entire petition is based upon misquoting the opinion of the Court of Appeals for the Second Circuit in a vital matter.

The "Opinion Below" (Petition and Brief, p. 2) is not an accurate copy of the opinion of the Court of Appeals and such inaccuracy is at the core of the petition and brief in support thereof. Woven into the petition and brief is the assertion, iterated in various forms, that the Court of Appeals did not review the record of the evidence but decided the case on "alleged evidence, which

it assumed from argument of counsel had been presented at the trial, but which in fact was non-existent" (Petition and Brief, pp. 1, 2, 5, 6, 8, 24). It is demonstrable that (a) the Court of Appeals understood the record; (b) the record amply supports the real opinion of the Court of Appeals; and (c) the petitioner has created and demolished a non-existent opinion of the Court of Appeals.

It is said in the petition (p. 6) that the Court of Appeals based its affirmance on a finding that *two* witnesses (Radigan and Petrosino) had testified that the hatchboard covers were in good condition *before* the accident. In an attempt to support that unfounded allegation, the opinion has not only been misquoted at page 3, but more viciously at page 7 where it has been written:

> "The Court continued:
>
> "* * * but did produce witnesses in the persons of Radigan and Petrosino, who testified in substance that the hatchboard covers were in good condition *before* the accident occurred.'" (Emphasis supplied.)

The Court did not say that. It actually wrote:

> "* * * but did produce witnesses in the persons of Radigan and Petrosino, who testified in substance that the hatchboard covers were in good condition *after* the accident and Radigan testified that they were in good condition *before* the accident occurred." (Emphasis supplied.)

Concerning the condition of the hatch covers *before* the accident there never was any dispute. Bearing in mind that the accident happened after 7 P. M., the following testimony of Radigan is found at page 36a, Appendix to Appellee's Brief, the first question relating to 5:10 P. M.:

> "Q. Now, the hatch covers that you saw at that time, either in place or lying alongside of the square

of the hatch, were they in good condition, so far as you could see? A. They were in good condition.

Q. I am talking about No. 1 hatch. A. Yes.

Q. In good condition? A. In good condition.

Q. And you could see nothing wrong with them? A. No.

Q. When was the next time that you got back to No. 1 hatch on December 18, 1947? A. About another hour I was around there looking.

Q. About 6:10? A. When they knocked off.

Q. And that is the time they go out to supper? A. Yes.

Q. And at that time was the condition of the main deck with respect to the crossbeams and the hatch covers still the same as it was at 5:10 P. M.? A. Yes.

Q. Was the 'tween deck with respect to the crossbeams and the hatch covers still the same? A. Yes.

Q. Now, when was the next time you returned to No. 1 hatch on the night of December 18, 1947? A. They came back from supper.

Q. No. When was the next time you returned to No. 1 hatch? A. 7 o'clock.

Q. And again was the condition of the No. 1 hatch the same? A. Yes."

At folio 149, the petitioner's witness, Zalinski, testified about the condition of the hatch covers on the night *before* the accident:

"Q. Now, when you covered this hatch by putting on the hatch covers that weren't already on you didn't find anything wrong with the hatch covers at that time, did you? A. No, sir."

And, again, at folio 157, the same witness testified:

"Q. You have testified that when you finished covering the No. 1 hatch on the night before the accident

there was nothing wrongg with the hatch boards or anything else. Now the next morning when you took them off was there anytthing wrong? A. To me it looked all right."

The petitioner's witness, Stanley Kosek, testified affirmatively that the hatch covvers were "all right" *before* the accident. The following aappears at page 18a, Appendix to Appellee's Brief:

"Q. As I understood yoour testimony, in answer to Mr. Gay, you yourself wwere standing on the hatch covers guiding this runneer before you turned it over to Pignataro? A. Yes, sir.

Q. Did you look arounad at the hatch covers? A. Yes, sir.

Q. Did they look all rigght to you? A. They seemed all right.

Q. If they had seemed bad to you would you yourself have walked on thosee hatch covers? A. No, sir.

Q. Would you have told any of your men to walk on those hatch covers? A. No, sir."

Thus, it is seen that Radiggan did testify to the condition of the hatch covers *before* the accident, as the Court of Appeals said he did. Addiitionally, his testimony was supported by two of the petiitioner's witnesses as indicated. There never was any dispute by any witness over the condition of the hatch covvers *before* the accident and, indeed, the petitioner does not even allege that any dispute on that subject ever exisited.

The witness Petrosino, the security officer, did not see the hatch covers *before* the accident. The Court of Appeals was perfectly clear on Petrosino's testimony and distinguished the testimony off Radigan and Petrosino by writing that they *both* testified the hatch covers "were in good condition *after* the accident and Radigan testified

that they were in good condition *before* the accident occurred."

As a prelude to presenting the testimony of Radigan and Petrosino concerning the condition of the hatch covers *after* the accident, its effect in demolishing what remained of the petitioner's case should be indicated. The whole case revolved around the allegedly broken hatch board. If it had broken and fallen into the hold, the longshoremen would have had to do *something* when it came time to cover up the hatch *after* the accident. They might have procured another hatch cover elsewhere, or they might have spaced the remaining eight hatch covers a few inches apart to take up gradually the total space previously occupied by the allegedly broken hatch cover. The petitioner chose the latter explanation and presented it through the witness, Sigmund Kosek (fol. 240).

As to the situation *after* the accident, Radigan testified as follows, at pages 24a, 25a, Appendix to Appellee's Brief:

"Q. Now you said that after the accident you looked down into the hold where Mr. Pignataro was; is that correct? A. Yes, sir.

Q. Did you see any hatch covers down in that hold? A. No.

Q. Now, was the hatch that night before you went off duty, was that No. 1 hatch covered? A. Yes.

Q. Who covered the hatch? A. The stevedores.

Q. Were you there when they covered it? A. Yes.

Q. What were the conditions of the hatch boards? A. The hatch boards were all placed on the hatch in good condition.

Mr. Schwartz: I object to that.

The Court: Overruled.

Mr. Schwartz: He doesn't know. He didn't see it.

The Court: He says he was there at the time the crew was putting the hatch boards on.

Mr. Schwartz: I didn't hear him say that.

The Court: Yes, he did.

Q. You were there at the time they were putting the hatch boards on and covering up the hold; is that right? A. Yes, sir.

Q. Was there anything wrong with any hatch board? A. No.

Q. Did any stevedore make any complaint to you that any hatch boards were defective? A. No, sir.

Q. Was the hatch fully covered? A. Yes, sir.

Q. Were there any beams vacant or missing? A. No.

The Court: Were there any spaces between boards?

The Witness: No."

Petrosino testified at pages 48a, 49a, Appendix to Appellee's Brief, concerning the condition of the hatch *after* the accident, as follows:

"Q. When you went back to the No. 1 hatch you do not know whether there were spaces in between some of the hatch boards—you did not look that closely? A. As I said, from my recollection every board seemed to be good.

Q. Are you willing to testify under oath that there were no two or three-inch spaces between some of those boards? A. Definitely, yes, sir.

Q. You are willing to testify to that? A. Yes, sir."

* * * * * *

"Q. But you remember this particular hatch, the No. 1 hatch on the Smiley, that all the hatch boards were exactly in proper position and no space in between the hatch boards; isn't that so? A. Yes, sir.

Q. You definitely remember that? A. Yes, sir.

Q. How far did you go in school? A. I graduated from grammar school and graduated from high school. I went to the Police Academy and Police College.

Q. And your memory is good enough to remember two years ago that the hatch boards were exactly in place with no space between any of the hatch boards? A. The reason I remember this—

Q. Is that correct, or isn't it correct? A. Yes, sir."

Someone lied. The trial judge found that Kosek did, and, once he believed the testimony of Radigan and Petrosino, the inference to be drawn was perfectly obvious, namely, the hatch board never went into the hold and, indeed, never was broken.

Petrosino did not testify he saw the hatch boards *before* the accident. The Court of Appeals did not say he did. The petitioner *claims* the Court of Appeals wrote to the contrary and has purported to quote from the opinion (pp. 6, 7). The material quoted does not exist, as inspection of the Court's actual opinion will disclose.

POINT I

The decision of the trial court was made on conflicting evidence.

The petitioner insists upon repeating here that his evidence was uncontradicted (Brief pp. 6, 15, 22, 23); he proved the hatch board broke (Brief, p. 15); no material fact was in conflict (Brief, p. 17); his witnesses were unimpeached and their testimony was credible (Brief, pp. 17, 19, 20, 21). This was unsuccessfully ventured in both the District Court and in the Court of Appeals. Apparently the theory is that if one states a proposition dogmatically and often enough it ripens into a "fact".

At the risk of repetition, it should be said again that there was one real and substantial issue of fact which was

tried before the admiralty judge. That issue of fact was whether the hatch board broke. The petitioner's case had inherent in it a very grave contradiction. Two of the witnesses (Zalinski and Stanley Kosek) said they saw the hatch cover fall in two pieces. Another witness testified twice he saw "the hatch cover coming down" and then said he saw it falling in two pieces. The fourth of these witnesses, namely, Carmine Pignataro, testified affirmatively that the hatch cover fell down in one piece.

The petitioner glibly endeavors to explain away the testimony of Carmine Pignataro (Brief, p. 9) by saying, "he doesn't remember two pieces of a hatch board falling with his cousin, as it was too dark for him and he was excited". That this is a distortion of the actual testimony of the witness may be demonstrated beyond all doubt by a mere reading of his direct examination at folios 188-193. The witness testified definitely, affirmatively and unequivocally, as the judge's comment shows, "he said it was a hatch cover". Part of the distortion arises from the question put to the witness whether he had looked (into the hold) after the accident and the witness said it was too dark. No amount of explanation or glossing over or twisting can change the objective fact that one of the petitioner's witnesses, similarly situated on the vessel as all of the others in the 'tween deck, did testify, as opposed to the others, that the hatch cover fell down in one piece. If the admiralty judge was justified in believing Carmine Pignataro, then further consideration of the petition should be needless.

But the deficiencies in the petitioner's case did not end with this direct conflict between petitioner's witnesses on this most important subject. The description of the alleged two pieces furnished by the witnesses Zalinski, Stanley Kosek and Zaluski was too much for the admiralty judge to stand. In that fraction of time it took the alleged two pieces to fall past them from the main deck, they were able

to be in complete and minute agreement (fols. 140, 141; 165-169; 183).

The difficulties with the petitioner's case did not end even there, for there appeared the hatch foreman, Sigmund Kosek, who testified for the petitioner. He forgot that he had signed a written statement less than a month before the trial (fols. 200-201), wherein he had said he did not know what caused Pignataro to fall (fol. 202). He proceeded without restraint to join the longshoremen's parade to prove the hatch board broke, all facts to the contrary notwithstanding. Even the record shows his evasiveness (fols. 201-203, and Appendix to appellee's brief, pp. 17a and 18a). Reference is made particularly to his answers, "it could be and it couldn't be". The situation at the trial was so bad that the admiralty judge took over the interrogation of this witness. The interrogation by the Court was conveniently omitted in the Appendix to the petitioner-appellant's brief, but the entire cross examination may be found in the Appendix to appellee's brief, pages 13a to 18a, inclusive, and the interrogation by the Court may be found at pages 17a and 18a.

In view of the total picture depicted by the petitioner's witnesses en masse, the respondent could have rested on the petitioner's case without changing the result. Actually, the respondent's trial advocate sought to demonstrate further, if such demonstration was really needed, that the petitioner's case was made of whole cloth. There were two ways in which trial counsel could meet what remained of an issue of fact. He could call eyewitnesses to the event or could prove other facts from which a reasonable inference might be drawn that the hatch cover did not break. He did both. Armed with written statements of the other two longshoremen who were on the deck at the time of the accident, he called them to the stand. The first witness, Privi, joined the petitioner's camp at the earliest opportunity, namely, under so-called cross examination by petitioner's proctor (fol. 219). He then dis-

avowed the written statement and went along with the others (fols. 222-238). Del Gatto repudiated his written statement shortly after the direct examination began (fols. 243-265). In both instances, the witnesses insisted upon remaining with their repudiation, and thus the respondent could not prove affirmatively by eyewitnesses what had really happened.

What life, if any, was left in the petitioner's case was extinguished by the witnesses Radigan and Petrosino. Their testimony furnished the *coup de grace,* as explained in Point I hereof.

The Court of Appeals recognized that the admiralty judge had made findings of fact on a direct conflict of testimony, and his conclusion destroyed the petitioner's case. It affirmed, saying, "it is almost superfluous to state that on this record the trial court's findings are not clearly erroneous". It thus applied the rule, firmly established and uniformly accepted in the Court of Appeals, that to relieve an appellate court from the impossible burden of assaying credibility, the weight of the evidence and kindred problems, a trial court's findings of fact will not be disturbed save in the rare instance of manifest error.

Petterson Lighterage & Towing Corp. v. *New York Central R. Co.,* 126 F. (2d) 992;
United States v. *Forness,* 125 F. (2d) 928, 942;
Kulukundis Shipping Co. v. *Amtorg Trading Corp.,* 126 F. (2d) 978, 980;
Johnson v. *Andrus,* 119 F. (2d) 287;
James Richardson & Sons v. *Connors Marine Co.,* 141 F. (2d) 226, 230;
Grillo v. *United States,* 177 F. (2d) 904;
Crane v. *Evans Transportation Corp.,* 155 F. (2d) 940, 941;
Fodera v. *Booth American Shipping Corp.,* 159 F. (2d) 795, 797;
Kilgust v. *United States of America,* 191 F. (2d) 69.

The rule demarcating the scope of appellate review has been applied exactly the same to cases where the admiralty judge has dismissed a libel because he has not been satisfied with the libelant's proof as to those cases where he made affirmative findings that certain conditions did exist.

> *Stuart* v. *Alcoa S. S. Co.*, 143 F. (2d) 178, 179;
> *Roberts* v. *United States*, 186 F. (2d) 1005, 1006;
> *Seaboard Sand & Gravel Corp.* v. *American Stevedores, Inc.*, 151 F. (2d) 846.

The substance of the foregoing doctrine is in complete harmony with the uniform principles enunciated by this Court. Concurrent findings of fact by the District Court and the Court of Appeals are adopted here as a conclusive basis for decision in the absence of plain error or no evidence at all to support the findings.

> *Virginian Ry. Co.* v. *System Federation, No. 40*, 300 U. S. 515, 542;
> *Williams Mfg. Co.* v. *United Shoe Machinery Corp.*, 316 U. S. 364, 367;
> *Texas & N. O. R. Co.* v. *Brotherhood Ry. & S. S. Clerks*, 281 U. S. 548, 558;
> *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 477.

This Court has said in *Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.*, 336 U. S. 271, 275:

> "* * * A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error (citing cases)."

The general rules established by the foregoing cases have been further particularized and rendered even more

apposite to the case at bar in *Just* v. *Chambers,* 312 U. S. 383, 385, where this Court held that it will not review the evidence as to the cause of a personal injury where it is urged the evidence is insufficient to support the findings of fact. In similar vein this Court has held in *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96, 98, that this principle involving appellate review is applied in admiralty cases, as well as in those where the suit has been at law.

Since the decision of the trial court was made on conflicting evidence, it is the well established rule that this Court will not grant certiorari to review that evidence especially where the Court of Appeals has concurred in the fundamental finding of fact.

POINT III

No affirmative finding of fact as to the cause of the accident was either necessary or possible under the facts.

Petitioner's assertion to the contrary (Brief, p. 22), he had the burden of proving that the hatchboard broke, whether he cast his claim in the language of negligence or unseaworthiness. *Grillo* v. *United States, supra.* In this he failed, and that was enough to conclude the dispute.

At the trial the respondent contended, although it was under no legal obligation to contend or prove anything, that the petitioner fell either because he lost his balance while reaching for the fall or because the cargo hook at the end of the fall caught under the hatchboard (fols. 292, 293).

The vessel's log which was offered in evidence by the petitioner (fol. 207) showed that the petitioner "lost balance and fell down into hold" (fol. 208). Thus, the log supported *both* of respondent's contentions, but did not point *exclusively* to either. Additionally, the log entry was

based upon hearsay, so it would have been questionable to make a needless affirmative finding of fact upon it, even though it was offered by the petitioner.

Privi had signed a statement that the petitioner was guiding the fall out of the hatch at the time of the accident (fol. 233) and Del Gatto had signed a statement that the petitioner "had his hands on the fall and was guiding it up when the shackle bolt caught on the under edge of the hatch cover on which he was standing. I saw the hatch cover raised about one inch and then slide toward the starboard side of the ship and causing Pignataro to lose his balance and fall into the hold" (fols. 254-256). The witnesses repudiated their statements.

The petitioner argues here that it is improper to call a witness for the purpose of impeaching him by inconsistent statements; such statements are not original evidence, and may be used only for impeachment (Brief, p. 15). He cites *Kuhn* v. *United States,* 24 F. (2d) 910, rehearing denied and reversed in part, 26 F. (2d) 463, cert. den., 278 U. S. 605; *New York Life Ins. Co.* v. *Bacalis,* 94 F. (2d) 200; *Fong Lum Kwai* v. *United States,* 49 F. (2d) 19; and *D'Allessandro* v. *Bechtol,* 104 F. (2d) 845. The respondent has no quarrel with the basic principles enunciated in those cases.

Privi's statement was used after he departed from the truth during cross examination and petitioner's advocate withdrew all objections to it at the time of trial (fols. 236, 237). Del Gatto's statement was used, with the permission of the trial Judge, as soon as Del Gatto embarked upon an obvious course of disavowing the statement and helping the libellant. The legal effect of these statements was well understood by the trial Judge, namely, they destroyed the credibility of the witnesses, *but did not affirmatively prove any fact recited in those statements.* The admiralty Judge made no affirmative findings of fact based upon them. If he had, he would have committed error.

The petitioner's complaint here is that the trial Judge did not commit the error; that "the trial Court made no finding of fact as to the cause or manner of the happening of the accident" (Errors Complained of, No. 1, Brief, p. 5). The speculation that if the trial Judge had affirmatively found either of the theories proposed by the respondent, it "might very well have been the basis for a decree in favor of petitioner under the law" (Brief, p. 5) is just fantastic. Either theory would obviously lead to automatic exoneration of the respondent.

POINT IV

The trial court's decision was not based upon any "mood" or "personal displeasure".

From the admiralty Judge's opinion (fols. 289-304) and his findings (fols. 307-316) it is patent his resolving of the conflicts was based upon a conscientious and deliberate weighing of the testimony, using those criteria traditionally employed by all triers of fact in finding the truth after seeing and hearing witnesses. It is utter blather to characterize the trial function as one of "mood" or "personal displeasure", because one dislikes the result emanating from the judicial process.

The trier of the facts has a function which is onerous, serious and even sacred to the extent its honest execution has a solemn oath as its sanction. The ascertainment of facts is not a mechanical science. It is an art involving judgment and to assist the trier in forming that judgment the law cautions that one should consider in the courtroom what one considers in dealings outside the courtroom, namely, the "demeanor" of witnesses. The trier of the facts looks as well for "interest", candor, conflicts of testimony, unusual agreement of witnesses in minutiae, indications of a contrived case, contradictions

between oral testimony at trial and previous declarations of the witness, and for similar guides which will lead him to ascertain the truth.

For all of the signs the admiralty Judge did look. He found "evasiveness" in several of the petitioner's witnesses and frequent conflicts between them in vital matters. His conclusions were based in part on "demeanor". He found contradictions between testimony at trial and previous written statements. He found the petitioner's witnesses in unusual agreement in minute detail, one of the best indices of the fabricated case. He credited the respondent's witnesses and did not believe those who testified for the petitioner. He did not make the error of determining the weight of the credible evidence by counting heads.

To attribute to the admiralty Judge's disbelief, conscientiously resting in his appraisal of the witnesses and their testimony, such words as "mood" and "personal displeasure" can hardly detract from the demonstrable fact that he actually performed his job well. A unanimous Court of Appeals has affirmed him. There the litigation should end.

POINT V

The cases cited by the petitioner are inapposite and there is no problem of law in the case.

The petitioner has cited not a single case to support his position that certiorari should be granted here. Indeed, research discloses no case where certiorari has been granted merely to review conflicting evidence on a common subject in private litigation where the record shows thorough consideration of the facts by both the trial court and the Court of Appeals. These Courts have concurred. The evidence has been twice appraised and unanimously found to defeat the petitioner's claim. As Mr.

Justice Holmes said in *United States* v. *Johnston*, 268 U. S. 220, 227:

> "We do not grant a certiorari to review evidence and discuss specific facts."

See also, the cases cited in Point II hereinabove.

The cases to which the petitioner has referred, and his miscellaneous arguments deal with such varied subjects as "remote posibilities", "inferences", "rules of evidence concerning physical facts", "credibility", "positive and negative evidence", etc. Such problems are all foreign to this petition for certiorari. But, as briefly as possible, the cases cited by petitioner and his promiscuous arguments will be discusssed for the sake of completeness.

Betzag v. *Gulf Oil Corp.*, 298 N. Y. 358, is presented for the proposition that the petitioner was not required to negative remote possibilities (Brief, p. 15). In this case the petitioner was not asked to deal with anything remote. His burden was simply to prove the hatch board broke and he did not prove it.

It is urged the Court below failed to consider the "Count for unseaworthiness" (Brief, p. 15). There was no "count" for unseaworthiness but the case was tried on that theory. The trial court dealt with the subject (fol. 315) as did the Court of Appeals (Opinion, fol. 61).

Cannella v. *Lykes Brothers S. S. Co.*, 174 F. (2d) 794 (Brief, p. 15) recognizes the well-known distinctions between negligence and unseaworthiness. The trial court disposed of both theories here (fol. 315).

At Brief, page 16, the petitioner has presented the case of *Erie R. Co.* v. *Murphy*, 9 Fed. (2d) 525; *Sutton's Adm'r* v. *Louisville & N. R. Co.*, 168 Ky. 81, 181 S. W. 938; and *Gulotta* v. *U. S.*, 113 Fed. (2d) 683. The first two of the named cases deal with the legal definition of

inferences and the distinction between inferences and presumptions. The respondent agrees entirely with the relevant portions of the two opinions. Indeed, the quotation from the *Sutton* case, explains in part why the petitioner failed in his proof at the time of trial. The third case dealt with a criminal trial and nothing whatever in it has even a remote bearing upon the case at bar.

Apparently, based upon the rules relating to inferences, the petitioner is presenting some argument about the trial court drawing an inference on an inference (Brief, p. 24). This is not so. The court drew no inference that the witnesses were interested in the petitioner's cause and from that inference drew the further inference that they were not telling the truth and from that inference that the hatch board did not break. The court simply applied the usual norms to the witnesses and the testimony before him as explained in Point IV hereinabove, and resolved the dispute against the petitioner. In this connection the petitioner has commented upon the fact that the ship's officers and master were not called as witnesses by the respondent (Brief, pp. 12, 24). The respondent was under no obligation to call anyone in view of the nature of the case presented by the petitioner, but as the witness Radigan explained, he had relieved the ship's officers who left the vessel at 5:00 P. M. two and one-half hours before the accident (Appendix to Appellee's Brief, p. 19a).

Petitioner's attack on the credibility of the witness, Petrosino, at Brief, page 17, is as irrelevant here as it is unfounded. He was the security officer at the pier. The quotation in petitioner's brief relates to Petrosino's testifying when a member of the New York Police Department. He had never testified before in a case involving a ship (Appendix to Appellee's Brief, p. 48a).

Barbarino v. *Stanhope S. S. Co.*, 151 F. (2d) 553 (Brief, p. 18) is presented in distorted fashion by beginning the

quotation in the middle of a sentence. It actually holds that where an admiralty judgesets up a standard of care, a norm against which a respondent's conduct is to be measured, the Court of Appals is not bound by that standard which obviously savors of a conclusion of law and is not really a finding of fact.

At pages 19-20 of the Brief,petitioner cites cases dealing with "uncontradicted" tetimony. Under the actual facts here that is quite fatuou.

Travelers' Indemnity Co. v.*Parkersburg Iron & Steel Co.*, 70 Fed. (2d) 63; *Mutual Life Ins. Co. of New York* v. *Sargent*, 51 Fed. (2d) 4; *Alaama Title & Trust Co.* v. *Millsap*, 71 Fed. (2d) 518; and *Gibson* v. *Southern Pac. Co.*, 67 Fed. (2d) 758, all dealt wit the problem of whether a trial judge should have submited the case to the jury or should have granted a motionfor a directed verdict. In all of the cases, except the *Alabama Title* case, the appellate courts held the issues wee for the jury. In the exceptional case, the court gave onclusive legal effect to the recitals in a previous court oder for eviction. In *Ariasi* v. *Orient Ins. Co.*, 50 Fed. (2d)548, the court held that the recitals in an order issued by he Prohibition Department were not evidence of the truthof such recitals.

To support some rule aboutthe weight of positive and negative evidence the petitioer has cited *The Buenos Aires*, 5 F. (2d) 425, *The Windrush*, 286 F. 251, *Lancashire Shipping Co.* v. *MorseDry Dock & Repair Co.*, 43 F. (2d) 750, and *The Fort St. George*, 22 F. (2d) 195 (Brief, p. 21). Generally, the cases are examples of the triers of the facts weighing idence given by those who saw or heard against evidenceby those who said they did not see or hear or evidence b fact witnesses against expert testimony. In no sense dothey disturb the traditional function of the trier of the fts to weigh the evidence. Indeed, in three of the cited ases that is what the trial

courts were doing. Beyond this, there was no "negative" evidence in the respondent's case. The witnesses testified affirmatively to what they personally saw.

The burden of proof of unseaworthiness was squarely on the shoulders of the petitioner. See *Grillo* v. *United States, supra.* The petitioner relies upon the case of *American Co. for International Commerce* v. *United States,* 26 Fed. (2d) 468, for the proposition that a ship owner has the burden of proving due diligence to make a ship seaworthy (Brief, p. 22). This is a well-recognized rule of law in cases of cargo damage, which the cited case was. This is equally true both under the Harter Act, 46 U. S. C. 191, which was involved in that case, and the Carriage of Goods By Sea Act, 46 U. S. C. 1300. Certainly the rule has nothing whatever to do with a personal injury action. Due diligence to make a vessel seaworthy is a matter of *defense* in a cargo case. Unseaworthiness is part of the libelant's affirmative proof where he has pleaded it as a ground for recovery in a personal injury action.

Nelson v. *Robin Line Steamship Co., Inc.,* 39 F. (2d) 430 (Brief, p. 22), dealt with negligence and iterated the rule that if the libelant shows a defective appliance and injury from it, he has sustained his burden of proof even though other inferences might possibly be drawn to exonerate the vessel. Obviously, there is a condition precedent, namely, proof of fault. In establishing fault (a broken hatch cover), this petitioner completely failed.

Of *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, no more can be said than it extended the doctrine of seaworthiness to longshoremen but there is no word in the opinions to indicate that longshoremen no longer are required to prove anything or that all they are required to do is to utter the magic word "unseaworthiness" and receive an automatic recovery even though the trier of the facts cannot believe the testimony presented.

The Irving S. Olds v. *The John M. McKerchey*, 72 F. Supp. 256; *The City of New York*, 147 U. S. 72, and *Belden* v. *Chase*, 150 U. S. 674 (Brief, p. 23) were all collision cases in which were applied the usual rules that once fault has been proved against a vessel, she has certain obligations as to proof if she is to be exonerated. Obviously, fault must be shown before the consequence follows. *United States Fidelity & Guaranty Co.* v. *United States*, 152 F. (2d) 46, cited at Brief, page 23, for the same proposition is so utterly foreign to the rule it is alleged to enunciate that no discussion whatever is warranted.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

EDWARD J. BEHRENS,
CHARLES H. LAWSON,
Proctors for Respondent.